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JAMES H. McKENNEY,
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Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Mar. 2, 1900.

No. 523.

FRED A. McMASTER, ADMINISTRATOR OF THE ESTATE OF FRANK E. McMASTER, DECEASED, PLAINTIFF IN ERROR AND PETITIONER,

vs.

THE NEW YORK LIFE INSURANCE COMPANY, DEFENDANT IN ERROR AND RESPONDENT.

TO REVIEW A JUDGMENT OF THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

GEORGE W. HUBBELL,
FREDERIC D. McKENNEY,
For the New York Life Insurance Company.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 3-2-1900

IN THE

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vs.

THE NEW YORK LIFE INSURANCE COMPANY, DEFENDANT IN ERROR AND RESPONDENT.

Additional Brief in Opposition to the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE.

The petitioner, Fred A. McMaster, as administrator of his intestate's estate, brought this action in the district court of Iowa in and for Woodbury county (R., 1), whence it was removed into the circuit court of the United States for the northern district of Iowa, western division, on the ground of diverse citizenship (R., 15), to recover from the defendant life insurance company $5,000, being the sum of five separate

policies for $1,000 each, which had been issued and delivered to the intestate on or about the 26th day of December, 1893 (R., 54, 9th). Jury was waived by stipulation of parties (R., 31), and the following, among other less material facts, were found by the court:

The application for the issuance was made at Sioux City, Iowa, and was dated December 12, 1893 (R., 12). It called for $5,000 of insurance on the "accumulation policy" plan, to mature in twenty (20) years, and contained the request: "Please date policy same as application" (R., 11).

The policies as issued, in addition to the agreement to pay the amount of the insurance immediately upon receipt and approval of proofs of death of the insured during the continuance of the policies, contained, in easily legible words, on their respective faces the following provisions:

> "This contract is made in consideration of the written application for this policy, and of the agreements, statements, and warranties thereof, which are hereby made a part of this contract and in further consideration of the sum of twenty-one dollars and — cents to be paid in advance, and of the payment of a like sum on the twelfth day of December, in every year thereafter during the continuance of this policy" (R., 6).
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> * * * * * *
>
> "The benefits and provisions placed by the company on the next page, are a part of this contract, as fully as if recited over the signatures hereto affixed."
>
> * * * * * *
>
> *Benefits and Provisions Referred to in this Policy.*
>
> "Benefits at end of accumulation period.—If the insured is living on the 12th day of December in the year nineteen hundred and thirteen, on which date the accumulation period of this policy ends, and if the premiums have been paid in full to said date, the insured shall be entitled to one of the six benefits following:"
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> * * * * * *

> "Grace.—After this policy shall have been in force three months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of 5% per annum for the number of days during which the premium remains due and unpaid. During said month of grace the unpaid premium with interest as above, remains an indebtedness due the company, and in the event of death during said month this indebtedness will be deducted from the amount of the insurance" (R., 9).

That in soliciting the insurance defendant's local agent pressed upon the decedent's attention the provision of the policy last above quoted (R., 52), and—

> "Relying on the benefits of this provision and in the belief that if he accepted a policy of insurance upon his life * * * the company could not assert the right of forfeiture until thirteen months had elapsed since the last payment of the annual premium" the intestate signed the application above noted (R., 53).

The trial court further found that the words "Please date policy same as application" were written into the application by the defendant's agent after the signing thereof. * * * "And it does not appear that Frank E. McMaster (the insured) ever knew that these words had been written into the application and it affirmatively appears that he had no knowledge thereof when the application was forwarded to the home office of the company and was acted upon by the company" (R., 53).

The policies when issued were handed to the insured by the defendant's said agent, who, in response to insured's inquiry as to whether "the policies were as represented, and if they would insure him for the period of thirteen months," replied "that they did so insure him," and thereupon the insured paid the first premium on each policy "and without reading the policies he received them and

placed them away." The agent did not in any way attempt to prevent McMaster from reading the policies, and he had the full opportunity for reading them, but in fact did not read them, and accepted them upon the statement of the agent above set forth (R., 54, 9th).

In November, 1894, notice was sent to the insured "of the coming due of the premiums on the policies issued to him by the defendant company, in accordance with the requirements of the statutes of New York"(R., 54, 10th), and on the 11th or 12th of December, 1894, defendant's agent, with the renewal receipts for the second annual premium, called on the insured to collect the premiums in question, which the insured declined to pay, "saying that he had seen other policies which promised better results and that he did not think he would renew the insurance in the defendant company."

The agent then stated that "the grace on the second premiums would expire on January 11, and McMaster said if he concluded to keep any of the insurance he would call and pay for it before the grace expired" (R., 54, 55, 11th).

The insured died at Sioux City on the morning of January 18, 1895 (R., 55, 15th).

The second year's premiums on said policies have not been paid, and, though sufficient proofs of death were forwarded and received by defendant company, the policies have not been paid, payment being refused on the ground that by reason of the failure to pay such premiums the policies had lapsed and were not in force at the date of the intestate's death (R., 55, 56).

Upon such findings and others less material to plaintiff's contention (R., 52–56) the trial court entered judgment in favor of the defendant (R., 56).

Upon writ of error from the circuit court of appeals for the eighth circuit this judgment was affirmed with costs (R., 102), and an elaborate petition for a rehearing of said cause was denied (R., 131).

To review and overturn the concurring judgments of the circuit court and the circuit court of appeals for the eighth circuit the petition for a writ of certiorari now before you has been filed.

ARGUMENT.

This case does not embrace any of the points of law raised in the various cases against another insurance company now pending on certiorari in this court.

Neither the construction nor application of a State statute claimed to affect vast lines of insurance business transacted without such State is here involved, nor is any novel question concerning the admission or rejection of evidence presented for decision.

The case does not turn upon and indeed does not disclose any question of gravity or importance, and it is not suggested that the writ should issue in the interest of uniformity of decision.

The entire controversy turns upon whether the facts found by the trial court and spread at large on the record in the nature of a special verdict justify the judgment entered. Upon writ of error, after elaborate discussion, the majority of the court of appeals was of opinion that such judgment was proper, and it was ordered to be affirmed.

The case has no general bearing or significance. The facts concern this case alone. The concurring judgments are noteworthy only as evidencing the application of familiar principles of law to the facts disclosed.

It is said to have been the purpose of the act of March 3, 1891, under which this application is made, to lighten the burden of business in this court, not to secure to dissatisfied litigants or adventurers a second review of their cases upon the merits, but to obtain such a review is the object of the present application.

The question before the trial court was whether upon the facts found the policies of insurance sued upon were alive or had expired. On their faces, the second annual premiums became due and the "accumulation periods" expired on the 12th day of March, though in different years. The early expiration of the "accumulation period" was evidently to the advantage of the insured. To have postponed the due date of the second premium would necessarily have postponed the expiration of the "accumulation period." The insured accepted the policies as written. He retained them in his possession without protest or criticism of their form or contents for more than a year. When his attention was specifically called to the fact that the second premium would fall due December 12, 1894, he made no remonstrance or objection, but said "he had seen other policies which promised better results, and that he did not think he would renew the insurance in the defendant company;" and when told that the month of "grace" allowed by the policies would expire January 11, 1895, he replied that "if he concluded to keep any of the insurance he would call and pay for it before the grace expired."

He did not call before the "grace" expired, nor did he pay the overdue premiums. He died January 18, 1895, and his administrator brought this suit.

2.

Prior to the passage of the act of March 3, 1891, which this court has declared was intended to reduce the volume of business on its ever-increasing dockets, jurisdiction to re-

view judgments and decrees of circuit courts was limited to causes where the matter in dispute, exclusive of costs, was in excess of $5,000, (Act May 1, 1875, 18 Stats., 316).

In an action upon a money demand, the matter in dispute "is the debt claimed and its amount, as stated in the body of the declaration, and not merely the damages alleged or the prayer for judgment at its conclusion must be considered in determining whether this court can take jurisdiction."

Shacker *vs.* Ins. Co., 3 Otto, 241.

Applying this test to the case at bar, it is apparent that prior to the passage of the court of appeals act this Court would have been without jurisdiction to review this case on writ of error. Under the court of appeals act it has had the benefit of a review in an appellate tribunal. It seems hardly probable that an unique provision of a law intended to reduce the number of cases coming to this court for review will be administered so as to secure to a commonplace case of no general interest, gravity, or importance, which could not have been reviewed by this court prior to the passage of that act, a second review upon the merits.

3.

During the pendency of this case in the circuit court the plaintiff herein filed a bill in equity to reform the policies of insurance here sued upon, so that they should conform to his contention as to the prior verbal agreement between his intestate and defendant's agent. The prayer of his bill was granted by the circuit court, which decreed accordingly. Upon appeal the circuit court of appeals reversed that decree and directed the bill to be dismissed. To review the action of the circuit court of appeals a petition for a writ of *certiorari* was filed in this court and promptly denied (171 U. S., 687). As the facts disclosed in that proceeding

were identical with those herein found, it would seem that the disposition of the latter application might well be governed by the action taken on the former.

It is respectfully submitted upon the whole matter that the petition should be denied.

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FREDERIC D. MCKENNEY,
For the New York Life Insurance Company.